In *Henderson* v. *Pennsylvania etc. Co.*, 103 C. C. A. 135, 179 Fed. 577, 582, the court quoting in part from *Davis* v. *Chicago etc. Co.*, 88 C. C. A. 496, 159 Fed. 18, said:

" 'Under the facts of this case, the relation that plaintiff sustained to his companion Pfeutze, did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion without a word of warning or protest. * * *'

"Measured by this standard, and the rule is founded on sound reason and is conducive to safety, we see no escape from the conclusion that Henderson was equally culpable with Brommer. He knew they were approaching a railroad crossing. As he approached he saw the view was shut off from the track. Thus ignorant of the safety or danger of the crossing, prudence, self-preservation, and the positive demand of the law called on him to stop before attempting the passage. The machine was under control, by his own account, only moving at a two-mile rate. Under the circumstances he was called on to act, or, if he chose to keep silence and join in chancing the crossing, the law will not hold him faultless of his share of bringing about the accident." (Petition for Writ of Certiorari denied, *Henderson* v. *Pennsylvania R. Co.*, 223 U. S. 718, 32 S. C. R. 522.)

Bradley v. *Missouri Pacific R. Co.* (C. C. A.), 288 Fed. 484, 488 *et seq.*

Southern Railway Co. v. *Priester* (C. C. A.), 289 Fed. 945, 948, 949.

"As the undisputed evidence established that Anderson was in a position to see the danger as fully as Engstrom, and made no objection to Engstrom's attempt to cross in front

of the moving train, he is affected to the same extent Engstrom was."

Engstrom, Administrator of Estate of Anderson v. *Canadian Northern Ry. Co.* (C. C. A.), 291 Fed. 736, 741.

It appears from the foregoing authorities that the plaintiff's negligence, if any, was of the same character as Merchant's negligence, if any, and that there is no legal ground for assuming in such circumstances that plaintiff's negligence might be a remote cause and Merchant's negligence a proximate cause of the accident.

b. But if it were possible that in such circumstances negligence of Merchant might be a proximate cause, and plaintiff's negligence a remote cause, then the question of whether or not plaintiff's negligence was a proximate cause would be one for the jury; and the charge of the District Court clearly and repeatedly pointed out to the jury that the plaintiff's negligence must be a proximate cause of the accident to bar his recovery.

The court told the jury (R. 189) that if the plaintiff "personally was guilty of no negligence himself; that he in no way contributed to any improper operating of the car, and he was injured by the defendant in this case because of a faulty or defective condition of the car or because of an excessive running of the car at an excessive rate of speed," then the verdict should be for the plaintiff.

Again, the court told the jury (R. 190) that "if the plaintiff in no wise urged or contributed to the fast running of that car, then the plaintiff would be entitled to recover, but if the plaintiff did urge the operation of that car at a fast rate of speed, or if he contributed to it in any way; or if, after seeing the danger, or knowing that the car was being operated at an excessive, wild rate of speed, he had reason to believe

that an accident would happen and that he would be injured thereby, it was his duty at the first opportunity available to him, to refuse to continue in such dangerous situation, and thereby avoid the danger to himself."

"Again, you are instructed that the plaintiff would not be held to have assumed the risk of an injury resulting from the defendant's negligence merely because the plaintiff failed to interpose his judgment against that of the defendant, unless you find that a man of ordinary care and prudence so situated would have abandoned the car.

"With reference to the defense of contributory negligence, you are instructed that it was the duty of the plaintiff to exercise ordinary care; that is, such a degree of care as a person of ordinary care and prudence would exercise under the same or similar circumstances to avoid injury to himself, and failure on his part to do so would constitute contributory negligence" (R. 191, 192).

"Again, you are instructed that the burden is upon the defendant to establish contributory negligence upon the part of the plaintiff" (R. 192).

Again, "If the plaintiff should suggest that the car be operated at a faster rate than that at which it was being operated, which within itself did not constitute apparent negligence, then the fact that he urged the faster speed, if the car was merely going at a low rate of speed, would not be negligence.

"In other words, he would have to encourage such rate of speed which within itself, to an ordinary, reasonable man who had the knowledge that the plaintiff had in this case, of the conditions which the evidence shows that he had, that it would be dangerous to so operate the car. In other words, he must simply exercise reasonable common sense, and if he knowingly encouraged a high rate of speed, he should

be bound to expect the consequence which would flow from the negligence in operating the car, but he would not be held to such condition if the extent to which he urged the faster rate of speed did not reasonably to a man in his situation indicate that it would be dangerous" (R. 193).

After the jury had retired, they returned into open court, as we have seen, and asked for further instructions as to what would constitute contributory negligence on the part of the plaintiff. The court, in its additional instruction, as we have already seen, said, in part: "Contributory negligence, gentlemen, such as will defeat recovery means conduct on the part of the plaintiff that contributes approximately to the injury. In other words, if, notwithstanding the negligence of the defendant, the plaintiff does something himself which reasonably contributes to the injury, approximately, then that is what is known as 'contributory negligence.' • • • In any case where the act of the plaintiff enters into approximately the circumstances which bring about the injury, then it is contributory negligence. • • • The burden of proving contributory negligence rests upon the defendant" (R. 203, 204).

Answering the suggestion of plaintiff's counsel the court further said: "In order to constitute contributory negligence, the plaintiff must have done something actively, or omitted to have done something passively, which to a reasonable man placed in his situation would have appeared to be such as would have brought about his injury. In other words, it must be such an act as a reasonable man acting in the circumstances in which he was situated, must reasonably have known that it would contribute to the accident; that he could reasonably have expected such a result to flow from the course which he had pursued, or he must have omitted to do something which a reasonable man, under the same circumstances, could have done in order to avoid the injury. In other

words, coming more particularly to the case in hand;" (here follows the portion of the instruction which the Court of Appeals held to be erroneous) (R. 205).

When that portion of the court's charge which was condemned by the Court of Appeals is considered in connection with the charge as a whole it seems clear to us that the Court of Appeals was not justified in its ruling even though the portion condemned were erroneous in itself.

The rule is well established that in determining the question of whether a charge to the jury correctly and fairly states the law, the charge should be examined as a whole.

In *Chicago Great Western Railway Co.* v. *McDonough,* 88 C. C. A. 517, 161 Fed. 657, 660, the plaintiff in error contended that portions of the charge of the District Court to the jury were erroneous. The Court of Appeals, through Mr. Justice Vandevanter, then a member of that court, said in denying the contention:

> "But some portions of it, if separated from the rest, would justly be regarded as objectionable. That, however, is not a fair test of their meaning, for as was said in *Magniac* v. *Thompson,* 7 Pet. 348, 390, 8 L. ed. 709, and *Spring Co.* v. *Edgar,* 99 U. S. 645, 659, 25 L. ed. 487:
>
> "'In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole as it must have been understood, both by the court and the jury, at the time when it was delivered.'
>
> "A reading of the entire charge makes it plain that the faults in the portions covered by these assignments were inadvertent, rather than intentional, and were so fully corrected by the effect of the charge as a whole that the jury could not have been misled or confused by them. They, therefore, afford no ground for complaint. *Railroad Co.* v. *Gladmon,* 15 Wall, 401, 409, 21 L. Ed.

114; *Evanston* v. *Gunn*, 99 U. S. 660, 668, 25 L. Ed. 306; *Baltimore & Potomac R. R. Co.* v. *Mackey*, 157 U. S. 72, 86, 15 Sup. Ct. 491, 39 L. Ed. 624."

See also *Agnew* v. *U. S.*, 165 U. S. 36, 50.

In *St. Louis & S. F. Ry. Company* v. *Jeffries*, 276 Fed. 76, 78, the court said:

> "We do not deem it necessary to cite authorities in support of the proposition that counsel may not select particular portions from the charge for the purpose of assigning error, but the whole charge must be taken together, and if it appears that the case is fully and fairly stated, the mere fact that certain passages standing alone would be subject to criticism is not important."

In *Boyd* v. *United States*, 271 U. S. 104, 107, 108; 46 Sup. Ct. 442, 443, a physician was convicted of violating an anti-narcotic act. Complaint was made in this court that a portion of the charge of the District Court was erroneous, but this Court held that, although the portion in question might be ambiguous, "it did not stand alone, but was to be taken in connection with what preceded it, and also what followed."

II.

The plaintiff made no definite objection, and saved no lawful exception to the action of the District Court in giving that part of the District Court's instruction condemned by the Court of Appeals, and that Court should have held that the plaintiff had waived his right, if any he had, to object to such instruction.

At the conclusion of the District Court's main charge to the jury the court asked counsel if there was anything else to be covered (R. 199). The only objection made by the plaintiff to the court's charge on the issue of plaintiff's contributory negligence in reference to the speed of the automobile was as follows:

"The mere supposed passenger riding in dangerous places, which we don't think is material here, because the proof shows that he was a passenger on this car. I had a memorandum here with reference to common dangers from the interruption of contributory negligence, but I think that any criticism I would have on that is cured by other portions of Your Honor's charge. I think you made it very clear as a whole, but I think that in the special charge you instructed the jury that, with reference to contributory negligence, in substance, that if Ellzey encouraged the running of this car at a high rate of speed, he would be guilty of contributory negligence. The criticism and exception to that is that Ellzey must have either known that it was dangerous to run it at the rate of speed at which he was encouraging it to be run, or the danger must have been so open and apparent that a person of ordinary care, situated as he was, would have appreciated that it was dangerous to run it at a high rate of speed (R. 200).

We have already set forth in Point I of this brief the additional charge on the issue of contributory negligence after the jury had returned for further instructions, and the proceedings incident to such additional charge. The record shows clearly that the District Court was earnestly endeavoring to comply with all reasonable suggestions of plaintiff's counsel, and to fairly present to the jury the law of the case, and that plaintiff's counsel did not, in any manner, suggest to the District Court the point upon which the Court of Appeals made its decision. At the risk of unnecessary repetition we set forth again just what was said by counsel and the court at the conclusion of the additional charge:

Mr. Jones: I really think you caught my view about it, but we will reserve an exception. The court has reasonably covered plaintiff's position, except this—

Mr. Lewis: Your Honor, if counsel is going to make an extended argument, I don't think it is proper at this time.

The Court: Gentlemen, I have covered the point sufficiently, and whatever right may be sought in the matter can be protected by the proper bill.

Mr. Jones: Yes, I am going to except to that portion of the charge (R. 206).

The plaintiff did not state what was his objection to the instruction, nor to what portion of it he was excepting.

The instruction as given by the District Court presents the same principle that was suggested in plaintiff's requested special instruction (R. 209):

> "* * * Again you are instructed that the plaintiff would not be guilty of contributory negligence by failing to demand or request the said Merchant to operate the said car at a lower rate of speed unless the plaintiff knew that the said speed at which the said car was being operated was dangerous, and unless you shall further find that a person of ordinary care and prudence situated as the plaintiff was would have interfered and prevented the said Merchant from operating the said car at so high a rate of speed. * * * It was not incumbent upon the plaintiff to set up his judgment against that of Merchant and that he had the right to assume that Merchant was familiar with the condition of the car and knew the rate of speed at which it could be operated with safety and unless the plaintiff knew that the same was being operated at a rate of speed that was dangerous, and unless he acquiesced in and agreed to such operation of the car at such dangerous rate of speed with full knowledge thereof, he would not be guilty of contributory negligence. * * *"

As stated by plaintiff's counsel (R. 199), the rule requires exceptions to be taken to the charge before the jury has retired; and as stated by the District Court (R. 199), the reason for this rule in taking the exceptions at that time "is to give the court an opportunity to correct the mistakes, if there be any."

A general exception to a charge is of no avail where the charge embraces several distinct propositions and any one of them is correct.

Cooper v. *Schlesinger*, 111 U. S. 148.

"The omission of the court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, because the bill of exceptions does not show that the defendant requested any instruction upon that subject."

Texas etc. Co. v. *Volk*, 151 U. S. 73, 78.

"It has been too frequently held to require the extended citation of cases that an exception of this general character will not cover specific objections which, in fairness to the court, ought to have been called to its attention in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specifically, the part of the instructions regarded as erroneous."

McDermott v. *Severe*, 202 U. S. 600.
Holder v. *United States*, 150 U. S. 91.
Baltimore etc. Co. v. *Mackey*, 157 U. S. 72, 87.
Newport News v. *Pace*, 158 U. S. 36.
Isaacs v. *United States*, 159 U. S. 487, 490, 491.
Texas etc. Ry. Co. v. *Cody*, 166 U. S. 606.
Guerini Stone Co. v. *Carling Construction Co.*, 248 U. S. 334.

In *Chicago Great Western Railway Co.* v. *McDonough*, 88 C. C. A. 517, 161 Fed. 657, the court held that a general exception to a considerable portion of the charge cannot be regarded as presenting a specific objection to a lesser portion, which in fairness to the trial court, should have been specifically called to its attention in order that the appropriate correction might be made, the court saying:

"If the defendant entertained any fear that the jury would be misled or confused by that which was faulty, it should, in fairness to the court, have specially called attention thereto in order that the appropriate correction could be made."

In *Bassell* v. *Hines* (C. C. A.) 269 Fed. 231, an action for personal injuries, the plaintiff complained that the Dis-

trict Court had erred in instructing the jury on the question of burden of proof. In denying the plaintiff's contention the Court of Appeals said:

> "The only exception taken was in these words: 'We except to the charge concerning the hassock being pushed into the aisle by a passenger or a third person and the consequent non-liability of the defendant.' This exception related to the whole charge upon this subject. A great part of such charge was unquestionably correct. That fraction which related to the burden of proof was not separately excepted to, nor was the attention of the court directed to that particular subject. The exception was unavailing to raise the question upon which plaintiff in error now relies."

As stated by this court in *Norfolk Railway Company* v. *Earnest*, 229 U. S. 114.

> "Not improbably the mistake in the instruction was purely verbal, and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant. But, be that as it may, the record discloses that full opportunity for presenting objections was afforded, and that the one now pointed out was not made. We must, therefore, apply the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein."

In *Boyd* v. *United States*, 271 U. S. 104, 108, *supra*, complaint was made that a part of the charge of the District Court to the jury was erroneous. It was shown that when the charge was considered as a whole, it was not subject to criticism. The court further said that no proper objection was made by the defendant, or exception taken by him; that at the conclusion of the court's charge the defendant asked for an additional instruction, which was given.

"With that addition the charge elicited no criticism or objection from the defendant, although there was full opportunity therefor. It evidently was regarded as consistent and satisfactory. Besides, in view of what was said in other parts of the charge, we are justified in assuming that, had the court's attention been particularly drawn at the time to the part complained of now, it would have been put in better form. Certainly, after permitting it to pass as satisfactory then, the defendant is not now in a position to object to it. *McDermott* v. *Severe*, 26 S. Ct. 709, 202 U. S. 600, 610, 50 L. Ed. 1162; *United States* v. *U. S. Fidelity Co.*, 35 S. Ct. 298, 236 U. S. 512, 529, 59 L. Ed. 696; *Norfolk & Western Ry. Co.* v. *Earnest*, 33 S. Ct. 654, 229 U. S. 114, 119, 120, 57 L. Ed. 1096, Ann. Cas. 1914C, 172." (46 S. Ct. 443.)

It has been said by a great lawyer, who once graced the Supreme Court of Missouri:

"It has become a trite common-place of the rules of appellate procedure that a general objection, in a case where the evidence is competent for any purpose, may not be laid in the record below (to use a homely simile) as an egg to hatch later in the appellate court into precise and definite objections—objections the point to which was concealed from the trial court and from opposing counsel and first came out of ambush and into sunlight in briefs to this court."

Bragg v. *Metropolitan Street Railway Co.*, 192 Mo. 331, 342, 343. Lamm, J.

The Circuit Court of Appeals "on writ of error in a civil case can review only erroneous rulings made by the trial court on questions called to its attention and passed on by it."

United States v. *National City Bank of New York*, (C. C. A.) 281 Fed. 754 (Writ of Error denied, 263 U. S. 726).

Wasatch Mining Co. v. *Crescent Min. Co.*, 148 U. S. 293.

Canal etc. Railway Co. v. *Hart*, 114 U. S. 654.

Retzer v. *Wood*, 109 U. S. 185.

Board of Commissioners v. *Sutliff*, 38 C. C. A. 167, 97 Fed. 270, 275.

The rules established by the foregoing authorities are particularly applicable to the case at bar. If Merchant was negligent in running the motor car at an excessive rate of speed and plaintiff was negligent in acquiescing in its being so run without objection, and if, in such circumstances, Merchant's negligence might be a proximate cause of the accident and plaintiff's negligence be only a remote cause, the distinction between the negligence of the one and the negligence of the other would be fine, indeed, and the plaintiff desiring to have that distinction made should have presented his contention to the court by clear and proper objection and exception. We have seen that he entirely failed in that regard.

The ruling of this court in *Gila Valley etc. Co.* v. *Lyon*, 203 U. S. 465, is particularly applicable to the point here under consideration. In that case the trial court had charged the jury that unless an accident to a railway brakeman was caused solely by the negligence of the conductor, the defendant railway company was liable. It was held that even if erroneous, in that "sole cause" is not synonymous with "proximate cause," the defendant was not prejudiced where further instructions, given at its request, were to the effect that if the conductor's negligence was the proximate cause of the accident, there could be no recovery, and the court's attention was not specifically drawn to the objection to the word "sole," this Court saying:

> "If the defendant had desired to obtain a more specific charge in relation to the distinction between 'sole' and 'proximate' cause of the accident, as applied to the negligence of the conductor, the court should have had its attention specifically drawn to the objection to the word 'sole,' and the particular freedom from liability asserted if the negligence of the conductor were the proximate cause of the accident, as distinguished from the sole cause. A general exception to the charge as given would not raise the question. *Congress & E.*

Spring Co. v. *Edgar*, 99 U. S. 645, 659, 25 La. Ed. 487, 491. The requests to charge as given show the jury had its attention drawn to the proximate cause, and that if the conductor's negligence were the proximate cause the plaintiff could not recover."

For the reasons above given we pray that the judgment of the Court of Appeals be set aside, and the judgment of the District Court be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1908

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER

vs.

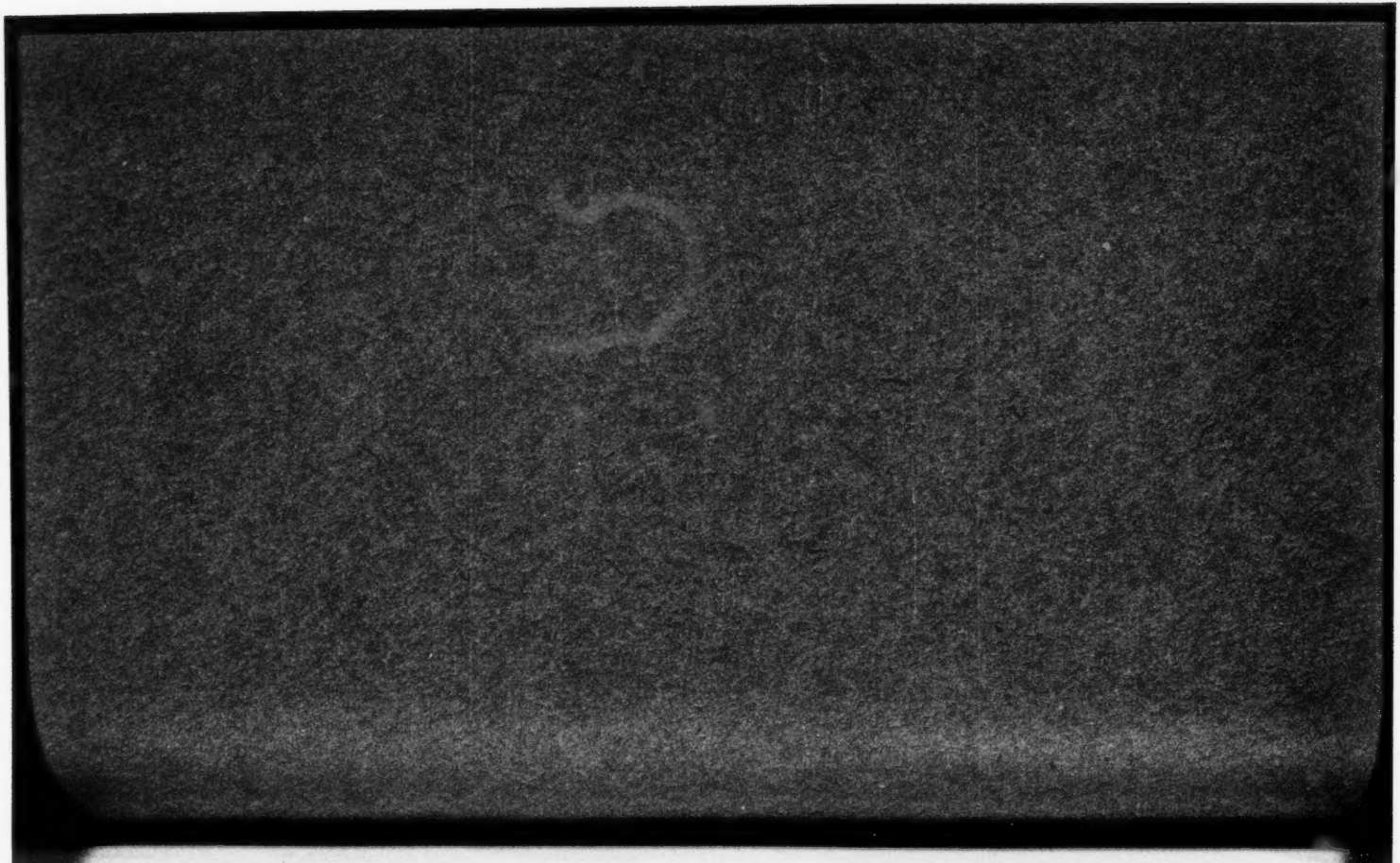
B. E. ELLERY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT.

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No. 63.

In the Supreme Court of the United States

OCTOBER TERM, 1927.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

R. E. ELLZEY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The respondent, R. E. Ellzey, will sometimes be referred to herein as the plaintiff, and the petitioner. The Kansas City Southern Railway Company, as the defendant (figures in parenthesis refer to pages of the printed transcript of the record).

I.

ISSUES RAISED IN THE PETITION FOR CERTIORARI.

On pages 2 and 3 of his brief plaintiff makes the following statement, giving his version of the issues raised by the petition for certiorari, and his contentions in reference thereto:

The jury retired to consider their verdict and later returned into court, and asked what would constitute contributory negligence on the part of the plaintiff. The court told them in substance that if the plaintiff acquiesced in fast running, he would be guilty of contributory negligence, and did not explain that if the driver with knowledge of such conduct on the part of the plaintiff, thereafter negligently caused the injury, that the jury might find plaintiff's negligence to be the remote, and the driver's negligence the direct or sole cause of the wreck, and thereby acquit the passenger of contributory negligence.

The plaintiff objected to this charge, but was not given (in fact was denied) opportunity to explain his reasons for objecting to it—in that the defendant protested against plaintiff being permitted to state his objections, and the court acquiesced in the position taken by the defendant, and declined to permit the plaintiff to make full objections.

The circuit court of appeals reversed the case because—the court erred in giving the charge on contributory negligence, which directed the jury to find plaintiff guilty of contributory negligence if he acquiesced in fast speed, though such negligence may have been remote, and the subsequent negligence of the driver, the direct or sole cause of the wreck.

We do not agree with plaintiff's statement as to the issues before this court, nor as to the proceedings in the district court. The questions here under consideration are, whether, as held by the court of appeals, the district court erroneously instructed the jury on the issue of plaintiff's contributory negligence, whether the plaintiff saved proper exceptions to the alleged errors in the charge, so as to bring the issue be-

fore the court of appeals, and whether plaintiff was prevented from saving such exceptions.

Taking up these propositions in order, and answering the above quoted contentions of plaintiff:

1. The district court's instructions were correct for the following reasons:

(a) The district court fully and fairly charged the jury, on the issue whether plaintiff's contributory negligence might bar his right to recover.

Plaintiff asserts that the court did not instruct the jury that the plaintiff's negligence might have been the remote and the lineman's negligence the direct or sole cause of the accident, and that such omission constituted error. The court, however, as shown by the record, told the jury that contributory negligence, such as would defeat plaintiff's recovery, must be conduct which contributed proximately to his injury (203); and that, to constitute negligence on plaintiff's part in encouraging or acquiescing in the operation of the motor car at a high rate of speed, the jury must find that it would be apparent to an ordinarily prudent person possessing the knowledge that plaintiff had in this case that such speed was dangerous, and that injury might reasonably be expected therefrom (193, 205). See the discussion of this question in paragraph (b), pages 10 to 13 of plaintiff's original brief.

(b) The court's charge must be considered as a whole, and, so considered, it correctly states the law. See the discussion of this question on pages 13 and 14 of petitioner's original brief.

(c) There was no warrant, under the pleadings, or under the evidence, for the giving of an instruction based upon the last clear chance doctrine, and the court of appeals erred in holding otherwise.

2. Plaintiff made no objection and saved no exception to the instructions upon the ground on which the court of appeals' decision is based, and the decision of the court of appeals is erroneous for that reason.

3. The plaintiff had full opportunity to state his exceptions.

We have discussed, in our original brief, the propositions stated above in paragraphs 1 (a) and 1 (b), and it is not necessary to discuss them further here.

We shall therefore proceed with the discussion of the proposition presented in paragraph 1 (c).

1. (c) There was no warrant, under the evidence, for the giving of an instruction based upon the last clear chance doctrine, and the court of appeals erred in holding otherwise.

In view of the contentions made by the respondent, and of the decision of the court of appeals, it seems advisable to give a summary of all the evidence which was before the jury on the subject of contributory negligence.

Ellzey was a United States Deputy Marshall who was detailed by the department of justice to guard employees of petitioner during the shopmen's strike in 1922. At the time of the accident, he had been sent with T. M. Merchant, a telegraph lineman employed by petitioner, for the purpose of guarding the lineman

while the latter was engaged in locating and remedying trouble on the telegraph line on petitioner's railroad between Leesville, Louisiana, and DeQuincy, Louisiana (33-34). Ellzey and the lineman traveled south from Leesville to DeQuincy on one of petitioner's passenger trains. The lineman had not discovered the cause of the trouble, when they reached DeQuincy, and consequently he and Ellzey stayed all night at DeQuincy (34-35). The next morning, the lineman secured a gasoline motor car, such as is used by employes of the railroad in traveling up and down the railroad track in the course of their work, and the lineman and Ellzey traveled north on this motor car to Singer, Louisiana, where the trouble was located and repaired by the lineman. They then proceeded north to Carson where some repairs were made to the motor car (144-146). The lineman's mission was accomplished, and he testified (144-159) that he wanted to leave the gasoline motor car at DeRidder, Louisiana, which was the first place north of Carson where the car could be kept in safety until placed on a train to be carried back to DeQuincy, but that Ellzey insisted that he run the car to Leesville, Louisiana, although they could have boarded the passenger train for Shreveport at DeRidder just as well as at Leesville. The lineman testified that Ellzey insisted that he operate the motor car to Leesville, and that he run it at a high rate of speed, in order to get there ahead of northbound passenger train No. 2, as shown by the following excerpts from his testimony:

"Q. What, if anything, did Mr. Ellzey say about the speed of the car from Carson on your trip North?
A. Well, 'Let her go. I have got to get to Leesville ahead of No. 2.'

* * * * * * * *

"Q. What did he say at the depot at Carson?
A. I was working on the switch board and I said something to Mr. Adams—I asked him if there was some place to get the motor car fixed at, and he said there was; and then he asked me where we were going, and Ellzey told him we were going to Leesville on the motor car and to Shreveport on No. 2. I says, 'I had about enough of that wild riding,' and he said, 'We will have some more of it if the damned thing stayed on the rail.'
"Q. Did you tell Mr. Ellzey, in the presence of Mr. Adams there at the station, where you wanted to stop?
A. I told him that I didn't think we could go to Leesville for No. 2.
"Q. Did you say anything about where you wanted to leave the motor car?
A. At DeRidder.

* * * * * * * *

"Q. Did you say anything to Ellzey about wanting to stop at DeRidder?
A. Yes, sir.
"Q. What did he say?
A. Said we were going into Leesville where we started.

* * * * * * * *

"Q. Did you tell Ellzey that you wanted to leave the car at DeRidder?
A. Yes, sir.
"Q. And he said what?
A. To go on to Leesville.

* * * * * * * *

"Q. State what, if anything, Mr. Ellzey said to you about the speed of the car after you left Carson?

A. Well, we had to go through a tunnel at DeRidder, and he says, 'We will have to run now'—And he stopped somewhere else at DeRidder and lost about four minutes; and he said, 'We sure enough will have to run now.'

"Q. Did Mr. Ellzey make any criticism or complaint with reference to the ability of the car to make speed?

A. Yes, sir.

"Q. State what those criticisms or complaints were?

A. 'What is the matter with the damned thing? It won't run any more.' When we started down the hill north of Ludington, he wanted to know what was the matter with the damned thing, it it would not run. One cylinder fell off (quit working) down the hill.

* * * * * * * *

"Q. At any time on the trip from DeRidder to Leesville, what, if anything, did Mr. Ellzey say to you, urging you to run the car faster?

* * * * * * * *

"A. He wanted to know what was the matter with the damned thing, it would not run any faster.

"Q. Weren't you running fast?

A. Yes, sir (146-150).

* * * * * * * *

"A. I suggested to Mr. Ellzey that we stop at DeRidder, and he said 'We will go to Leesville'" (156).

The lineman testified that he and Ellzey were 40 minutes ahead of passenger train No. 2, when they left Carson, and 17 minutes ahead of it when they left DeRidder, if it was running on time (157).

The lineman was instructed to go along with Ellzey, and to do as he said (158-159).

The lineman's testimony was corroborated by that of H. E. Adams (133-143), who, at the time of

the accident, was station agent at Carson, Louisiana. Adams said that he told Ellzey he did not think Ellzey and the lineman had time to go to Leesville ahead of No. 2, and that Ellzey replied that he would go if the motor car stayed on the track, and he would make it. Adams testified further that the lineman said that he was about through with his wild riding, but Ellzey replied that they would have some more of it if the damned thing stayed on the track. Adams also testified that Merchant wanted to leave the car at Carson, or at DeRidder, and Ellzey said he was going to Leesville ahead of No. 2 if it stayed on the track (135-137).

> "Q. Did Ellzey say or do anything that would indicate that he was in a hurry?
> A. Yes, sir; he wanted to go ahead of No. 2" (136).

It is not customary to carry passengers on hand cars (motor cars) (137).

Several witnesses testified that the motor car was running very fast, near the point of the accident (91, 95-97). D. M. Kimball saw Ellzey and Merchant leave DeQuincy on the morning of the accident, and heard W. M. James, section foreman, tell Merchant he had better not overspeed the motor car (103-105).

Ellzey denied urging Merchant to run the motor car faster, unless he did so while the car was disabled by having the gasoline feed pipe broken. This occurred when they had traveled some distance north of DeQuincy, and the brake was not repaired until they reached Carson (75). Ellzey stated that he believed

he cautioned Merchant to slow down while crossing switches in DeRidder, but that when the car was running fast, after leaving DeRidder, he made no complaint about the speed of the car (75). He also stated that they were in a hurry to catch a train to Shreveport, and that they just had 25 minutes to get to Leesville (80).

The circuit court of appeals in reversing the judgment in favor of defendants, on account of alleged error, in failing to instruct the jury on last clear chance, said:

> "The plaintiff complains of the refusal of the court to instruct the jury to find in his favor, and of instructions given by the court to the jury, including the following:
>
> If you should find that in this case the plaintiff urged, directed or counseled the driver of the car to run it at a reckless and high rate of speed, and that as a result of such reckless running the car was injured, then that would be contributory negligence which would bar his recovery, or if he saw that the car was being negligently run, in such a manner as with the knowledge that he had before him at the time a man placed in his position must reasonably have known that to continue in the situation he was in was dangerous without protesting or desisting and removing himself from the perilous situation at the earliest possible moment, then that would be an act of omission which would contribute to the injury, and would in law constitute contributory negligence." * * *
>
> "Under the above set out instruction to the jury the plaintiff could not recover if he voluntarily remained on the car after he saw that it was being negligently run, and a person of ordinary care situated as he was would have realized that it was dangerous to remain in the car.

> Though the plaintiff was negligent in the respect stated, if, as evidence adduced indicated, the defendant's employee was aware of such negligence in time to have avoided the injury by the use of reasonable care, and he failed to use such care, that failure might be found to be the sole proximate cause of the injury, and plaintiff's negligence be deemed a remote cause. *Chunn* v. *City & Suburban Railway*, 207 U. S. 302; 10 Corpus Juris, 1107. The plaintiff's right to recover was not barred if his negligence was only a remote cause of his injury, and Merchant's negligence was the sole proximate cause of it" (241).

It is our position that the court of appeals erred in its decision because there was no pleading, and no proof before the jury, which would bring this case within the exception known as the last clear chance doctrine, and no occasion or justification for giving such an instruction to the jury.

Under the evidence above set forth the jury was justified in finding that Ellzey negligently ordered, encouraged or acquiesced in the running of the motor car at an excessive rate of speed, when he knew, or should have known, that it was dangerous to do so, and that his influence or attitude continued up to the moment of the accident. There was, on the other hand, no evidence upon which an instruction based on the last clear chance doctrine could have been given. There was no evidence that Ellzey had gotten into a situation of imminent peril, or into a trap from which he could not extricate himself, or that he had changed his attitude as to the speed of the car. In fact there was no evidence that there was any change in conditions until the accident actually happened, and there-

fore there was nothing to support the making of an exception based on the last clear chance doctrine. Our contention is, we submit, supported by the following authorities:

The court of appeals, and respondent, cite Section 1490, 10 Corpus Juris 1107; but there, after it is stated that

> The doctrine of the preceding section that contributory negligence to defeat recovery must be the proximate cause of the injury leads to a well recognized rule that, if the negligence of the passenger is known to the employees of the carrier, or in the exercise of proper care might have been known to them, and by the exercise of the degree of care required of carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of its employees in not avoiding such injury, such fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause;

it is further stated that

> This rule applies *when, and only when, the carrier's opportunity of preventing the injury* by the exercise of due care *is later in point of time* than that of the passenger. Constructive knowledge on the part of the carrier gives rise to such opportunity where an employee of the carrier actually sees the passenger and the *passenger's situation is such as to indicate* to a man of ordinary prudence *that he is in danger of being injured*, or *where the passenger is in a situation of peril from which he cannot extricate himself and it is the duty of the carrier to keep a lookout*, but where there is not sufficient time after the discovery of plaintiff's peril for the employees of defend-

> ant to prevent the injury, there is no room for the application of the rule. There is authority, however, to the effect that it is a misuse of terms to speak of the passenger's conduct in such case as contributory negligence, and that the rule in question is but the statement in another form of the proposition that antecedent misconduct or negligence on the part of the passenger, *such as could not have had any influence on the conduct of the carrier,* will not defeat a recovery for injuries inflicted by the immediate negligence of the carrier. (All italics in this brief are ours.)
>
> See also, 29 Cyc. 530.

In the case of *St. Louis & San Francisco Ry. Co.* v. *Schumacher,* 152 U. S. 77, 81, the plaintiff, an employee, was riding in an improper place on a train. Some other cars were allowed to run down a grade and strike the portion of the train on which plaintiff was riding, causing him to be thrown off and injured. The court, in holding that plaintiff's contributory negligence barred his recovery, said:

> The only negligence chargeable against the defendant was in backing the train down at too great speed. But, giving to his own conduct as well as that of the defendant the construction most favorable to the plaintiff, there was no theory upon which it was proper to submit the case to the jury. *There was no negligence by the defendant shown as occurring subsequent to the negligence of the plaintiff, since his negligence was continuous down to the moment of the injury.*

In the case of *Wheelock* v. *Clay,* 13 Fed. (2d) 972, 973, the circuit court of appeals, eighth circuit, stated the rule as follows:

The "last clear chance doctrine" presupposes negligence on the part of the defendant, and contributory negligence on the part of plaintiff (*A., T. & S. F. Ry. Co.* v. *Taylor*, (C. C. A. 8) 196 F. 878, 116 C. C. A. 440), and is an exception to the general rule making contributory negligence a defense (*Denver City Tramway Co.* v. *Cobb*, (C. C. A. 8) 164 F. 41, 90 C. C. A. 459). There are limitations, however, to the application of the doctrine.

In the case last cited, this court said:

> "First. *The exception does not apply where there is no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuous and operative down to the moment of the injury.*" *St. Louis & San Francisco Ry. Co.* v. *Schumacher*, 152 U. S. 77, 81, 14 S. Ct. 479, 38 L. Ed. 361; *Illinois Central R. Co.* v. *Ackerman*, 76 C. C. A. 13, 144 F. 959; *Missouri Pacific Ry. Co.* v. *Moseley*, 6 C. C. A. 641, 57 F. 921; *Gilbert* v. *Erie R. Co.*, 38 C. C. A. 408, 97 F. 747.

The court of appeals, in its decision in the present case, also cites, as an authority, the case of *Chunn* v. *City and Suburban Railway of Washington*, 207 U. S. 302. In that case, however, a person who intended to take passage on a street car had taken her position, as was customary, between two tracks over which the street cars were operated. While waiting for the car on which she intended to take passage, and just as her car was approaching, she was struck by a car going in the opposite direction on the adjacent track. At the moment of the accident the plaintiff was in a position between the two street cars from which it should have been evident to defendant's motorman that she could not extricate herself, and consequently her contribu-

tory negligence did not continue as an efficient cause up to the very moment of the accident. In this case, however, Ellzey had the opportunity, up to the moment of the accident, to countermand his request or command that Merchant run the car at a high rate of speed, or to protest against such fast running, and, as he failed to do so, his negligence continued as a contributing cause. Ellzey himself testifies that he made no complaint against running the car fast after it left DeRidder (75).

In the case of *St. Louis & S. F. R. Co.* v. *Summers*, 173 Fed. 359, the Circuit Court of Appeals, 8th Circuit, in discussing the *Chunn* case, said:

> This leaves for our consideration the sole question whether there was any evidence to support the finding necessarily made by the jury that defendant railroad company could, by the exercise of ordinary care, after discovering that the decedent was in a situation of peril and danger, have avoided injuring him. The rule is well settled that, notwithstanding such contributory negligence of a traveler in crossing a railroad track as precludes recovery for the primary negligence of the railroad company in operating its train so as to bring about a collision with him, yet *another and different cause of action arises in favor of the traveler if for any reason he is exposed to imminent peril and danger, and the railroad company, after actually discovering that condition, could, by the exercise of ordinary care, have stopped its train or otherwise have avoided injuring him, and failed to do so. Chunn* v. *City & Suburban Railway*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; *Denver City Tramway Co.* v. *Cobb*, 164 Fed. 41, 90 C. C. A. 459. But in the application of this rule care must be taken to avoid undermining the rule of contributory negligence. Such negligence

> of the traveler in law fully exonerates the railroad company from the consequences of its original negligence, and *some new and subsequent act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof, unaided by the former acts, which have been excused by the traveler's contributory negligence.*

There is, in the instant case, no evidence whatever that the lineman discovered that Ellzey was in imminent peril. There is no proof that any new act of negligence arose, but, according to the evidence, the same condition which had arisen, either through Ellzey's request or with his acquiescence, continued up to the very moment of the accident.

In the case of *Virginia Ry. & Power Co.* v. *Leland*, 143 Va. 920, 129 S. E. 760, the court stated the last clear chance rule as follows:

> "The foundation of the doctrine is that the parties are guilty of concurring negligence, and *there must be some condition, circumstance, or superadded fact which one of the parties saw, or by the exercise of ordinary care could have seen, that made it his duty to endeavor to avoid injury to the other negligent party, and the obligation of discovering the last clear chance is mutual.*"
>
> *Green* v. *Ruffin*, 141 Va. 628, 125 S. E. 747.
>
> *McNamara* v. *Rainey Luggage Corp., et al.*, 139 Va. 197, 123 S. E. 515.

> "One relying on the doctrine of the last clear chance has *the burden of proving affirmatively* by a preponderance of evidence that by the use of ordinary care after his peril was discovered there was in fact a clear chance to save him."
>
> *Washington & Old Dominion Railway* v. *Thompson*, 136 Va. 597, 118 S. E. 79.

Hendry v. *Virginia Railway & Power Co.*, 130 Va. 283, 107 S. E. 716.
Ashby v. *Virginia Railway & Power Co.*, 138 Va. 310, 122 S. E. 104.

Plaintiff's several petitions contained no allegation, and plaintiff offered no evidence, in support of the last clear chance theory. We feel justified in saying that such theory first came into the case when the court of appeals rendered its decision.

In the case of *Kinney* v. *Chicago Great Western R. Co.*, 17 Fed. (2d) 708, 709, the rule is stated in the following language:

> The "last clear chance" doctrine is one applied by courts as an exception to the defense of contributory negligence. It is to be invoked in cases where plaintiff has contributed to the negligence of the defendant, but in which case the defendant possessed the last opportunity of avoiding the injury, and further that the defendant knew of such.

In the case of *Gilbert* v. *Erie R. Co.*, 97 Fed. 747, the rule is stated, in the second syllabus, as follows:

> The rule that a plaintiff who, by his own negligence, placed himself in a dangerous position, where an injury was likely to result, may still recover for such injury where the defendant, with knowledge, or such notice as is equivalent to knowledge of plaintiff's danger, failed to exercise reasonable care by which the injury might have been avoided, has no application to a case where the injury was the result of the concurrent negligence of both parties.

See also:

Pennsylvania R. Co. v. *Swartzel*, 17 Fed. (2d) 869, 870.

Allnutt v. *Missouri Pacific R. Co.*, 8 Fed. (2d) 604, 606.
Robbins v. *Pennsylvania Co.*, 245 Fed. 435, 441.
Reaver v. *Walch*, 3 Fed. (2d) 204.

The rule as to last clear chance is the same in the State of Louisiana, where the accident happened.

In *Hammers* v. *Colorado Southern Ry. Co.*, 128 La., 648, the Supreme Court of Louisiana said:

> The last clear chance doctrine is not applicable where the negligence of plaintiff and defendant are concurrent and each continues to the very moment of the accident.

See also *Harrison* v. *Ry. Co.*, 132 La., 761; *Callery* v. *Railway Co.*, 139 La., 763; and *Castile* v. *O'Keefe*, 138 La., 479.

Plaintiff lays great stress upon the decision of the Court of Appeals of the 9th Circuit in *Weisshaar* v. *Kimball S. S. Co.*, 128 Fed. 397. In that case, suit was brought by Ella M. Weisshaar as administratrix, for the death of her husband, who was drowned by the capsizing of a small boat of the defendant steamship company. Defendant's steamship was anchored about a mile and a half from the shore, and passengers were to be taken from the shore to the steamship in the small boat, which was in charge of the second officer of the steamship. The boat capsized in going from the shore to the ship. The steamship company contended that deceased was negligent, because the boat was intended to contain only fourteen people, and eighteen persons crowded into it, with some additional luggage, and that this was done over the protest of the officer in command, which protest was heard by Weiss-

haar. The district court held that the deceased was guilty of contributory negligence and dismissed the plaintiff's petition. The court of appeals, however, held that the officer in command of the boat was negligent in permitting the boat to be overloaded, and that he was further negligent in continuing the journey after passing out of the smooth water into rough water. The principle applicable to the Weisshaar case is very different from the principle applicable to this Ellzey case. In the Weisshaar case, a boat intended for the carriage of passengers, was being used for that purpose at the time. It had an officer and crew in charge. Furthermore, when the passengers insisted on getting into the boat, the boat was then in still water, and the imminent peril to the passengers occurred when the boat approached the rough water. This new hazard imposed a new duty on the officer to turn back. In this Ellzey case, "the plaintiff's relation to the motor car and its operator was not that of an ordinary passenger" (R. 241), and there was no evidence of any change of conditions or hazards up to the moment of the accident. Another most important difference between the Weisshaar case and this Ellzey case is that in the Weisshaar case the district court held that the deceased was guilty of negligence as a matter of law; in this Ellzey case the question of plaintiff's contributory negligence was submitted to the jury.

2. Plaintiff made no objection to the instructions upon the ground on which the decision of the court of appeals is based, and the decision of the court of appeals is erroneous for that reason also.

This proposition has been discussed in petitioner's statement and brief, pages 14 to 20, and need not be further stated here.

3. The plaintiff had full opportunity to state his exceptions.

Plaintiff makes the statement several times in his brief that he was prevented from making detailed objections to the court's instruction because of protests made by the defendant and acquiesced in by the court (see for example page 5 of respondent's brief).

It appears from the record (182-199) that the court fully instructed the jury on the law of negligence and contributory negligence. There was nothing in this main instruction presenting the last clear chance theory. At the conclusion of this main charge the court asked counsel if there was "anything else" (199) and plaintiff's counsel thereupon made several objections to the charge, but made no objection to the failure of the court to submit the case on the last clear chance theory. After the jury had retired, it came back with a request for further instructions on the issue of contributory negligence. After the court had given such additional instructions, plaintiff's counsel made objections to the instruction as given, but without any request for the submission of the case on the last clear chance theory, and, in response to plaintiff's objections, the court endeavored to meet those objections. Plaintiff's counsel then raised the question as to whether defendant's answer had raised the issue of plaintiff's concurring in the negligent speed of the car, and after that question had been settled, plaintiff's counsel said to the court:

> "I really think you caught my view about it, but we will reserve an exception. The court has reasonably covered plaintiff's position, except this" (269):

Counsel for defendant did not object to plaintiff's counsel stating his exceptions. What he did say was:

> "Your Honor, if counsel is going to make an *extended argument*, I don't think it is proper at this time" (269).

Respondent was represented by lawyers of large experience and ability, and of unquestionable courage, who would not have failed to insist on getting their exceptions fully in the record, if any exceptions, as distinguished from mere matters of argument, in addition to the exceptions they had already stated, had occurred to them. The record shows that the district court was patient, and willing to listen to any proper suggestions or exceptions. In such circumstances, there is no room for plaintiff's contention that he was prevented from making proper objections and exceptions to the instructions of the district court.

See also discussion on pages 14 to 20 of petitioner's original brief.

II.

ISSUES NOT RAISED IN THE PETITION FOR WRIT OF CERTIORARI.

Plaintiff, after discussing the above matters, states (Brief, 16 *et seq.*) that if the court of appeals erred in the ruling upon which it reversed the case, there were other errors upon which the case should have been reversed, as pointed out in his assignment of errors before the court of appeals, and he contends that the case should be reversed on those grounds.

The other alleged errors complained of by plaintiff reduce themselves to the contentions that the court of appeals should have held that the district court erred in failing to give instructions charging the jury, in effect, as a matter of law: First, that plaintiff was a passenger; and second, that because he was a passenger his contributory negligence would not bar his right of recovery.

There is no merit in respondent's contentions for the following reasons:

(a) **There was no error or prejudice to the plaintiff in the ruling of the court of appeals that the question of plaintiff's status as passenger, or otherwise, was properly left to the jury.**

The plaintiff was a guard employed generally to protect the employees and property of the defendant from violence, and detailed at this particular time to protect defendant's lineman while he was engaged in

repairing its telegraph lines. For the convenience of the lineman, and himself, they took a small railroad motor car to carry them in search of the defect in the telegraph lines. This car was intended solely for the conveyance of employees, and not for the conveyance of passengers, and this must have been known to the plaintiff at the time. In permitting the lineman to select this vehicle, and in using it with him, plaintiff did not put himself in the position of a passenger, but became a joint user thereof, with the rights and obligations incident to such use. There was also the question whether Ellzey was anything more than a trespasser in continuing on the motor car beyond DeRidder. The court of appeals was therefore right in its statement that:

> "The plaintiff's relation to the motor car and its operator was not that of an ordinary passenger. He was a public official performing a duty to which he was assigned. That circumstance was proper to be considered in determining whether plaintiff did, or did not, have such control as resulted in his conduct being a direct and efficient cause of the peril which resulted in his injury. Under the evidence adduced it was a question for the jury whether the plaintiff did or did not directly contribute to the injury complained of. It follows that the court did not err in refusing to direct a verdict in his favor" (241).

The plaintiff did not come within the definition of a passenger, which is stated by a standard authority as follows:

> "The relation of carrier and passenger is dependent on the existence of a contract of carriage, express or implied, between the carrier and the

> passenger, made either by themselves or by their respective agents. It is the existence of such a contract which distinguishes a passenger from a licensee, a trespasser, an employee of the carrier, an employee of a sleeping car company, and other persons riding in the carrier's vehicles'' (10 C. J. 611).

Furthermore, the plaintiff is in no position to complain on this question for the district court told the jury that if the lineman and plaintiff were properly using the car at the time of the accident, the plaintiff was a passenger (188) and that the defendant owed him the duty to exercise a high degree of care for his safety (191). This instruction being all that the plaintiff asked in that regard, and more than he was entitled to, he has no ground of objection (*Chicago etc. Co.* v. *Ward*, 252 U. S. 18, 23; 40 S. C. R. 275).

(b) Even if plaintiff were a passenger his contributory negligence would bar his right of recovery.

The rule imposing a high degree of care upon a carrier of passengers is based on substantial reasons, the principal one of them being that the carrier operates and maintains the facilities of transportation, and is familiar therewith, while the passenger ordinarily has no opportunity to inspect the facilities or control their operation. For this same reason the passenger, not having reasonable opportunity to inspect or control the facilities, is not negligent if he fails to do so. But, as the reason changes, the rule also changes. For example, a passenger who is injured by the negligence of the carrier due to a defect or misconduct which the passenger, in the exercise of due

care, should have guarded against, the passenger's contributory negligence is a defense.

In *Elder Dempster Shipping Company* v. *Pouppirt*, 125 Fed. 732, 738, it was held that where a passenger voluntarily left a place of safety on a ship and went to a more hazardous place where repairs were being made, and was injured as a result of a risk which, in the exercise of due care, he should have avoided, he was not entitled to recover. In its opinion the court said, in part:

> In *Ingalls* v. *Bills*, 9 Metc. (Mass.) 7, 43 Am. Dec. 346, the court, after stating the law with regard to carriers of goods, says:
>
> > "But in regard to the carriage of passengers the same principles of law have not been applied, and for the obvious reason that a great distinction exists between persons and goods; the passengers being able to take care of themselves and of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods cannot do, who have intrusted them to others."

In *Mendelson* v. *Davis*, 281 Fed. 18, 22, plaintiff sued for injuries sustained from being thrown off of a train by reason of a vestibule door being left open. On appeal from a judgment against him plaintiff complained that the trial court erred in refusing to instruct the jury that "a passenger does not assume acts of negligence on the part of carrier's servants." The court of appeals held that this instruction was not warranted on the facts in the case, "* * * for, if the trap-door was open, when plaintiff first passed through the vestibule and saw it, or if it was ob-

vious, and he assumed to cross, he assumed the risk."

In *John J. Radel Co.* v. *Borches,* 147 Ky. 506, 145 S. W. 155, it was held that if the driver of a carriage in which a plaintiff was riding left the carriage and horses unattended, at the invitation or request of the plaintiff, or at the request or invitation of any of its passengers, in the presence of and without objection by the plaintiff, the plaintiff could not complain of injuries resulting from the horses running away.

In the case of *Monongahela River etc. Co.* v. *Schinnerer,* 196 Fed. 375, 382, the court said:

> * * * where two or more persons take an active part in a joint enterprise, the negligence of each, while so actively engaged, is regarded as the negligence of all. *Railroad Co.* v. *Kistler,* 66 Ohio St. 326, 343, 64 N. E. 130. And guests and passengers cannot be relieved of a charge of negligence from the mere fact of such relation, when the appearances or circumstances coming to their notice were such as to indicate danger and to give opportunity to avert it by timely warning or active effort on their part. *Davis* v. *C., R. I. & P. R. Co.,* (C. C. A. 8) 159 Fed. 10, 18, 88 C. C. A. 488, 16 L. R. A. (N. S.) 424; *Brommer* v. *Pennsylvania Co.,* (C. C. A. 3) 179 Fed. 577, 581, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Brickell* v. *Railway Co.,* 120 N. Y. 290, 293; 24 N. E. 449, 17 Am. St. Rep. 648.

In *Winston's Administrator* v. *City of Henderson,* 179 Ky. 220, it was held that a passenger in an automobile may not recover damages for injuries sustained by reason of the negligence of an intoxicated driver, whose condition was known to the passenger. The court said:

> One about to enter a car should exercise reasonable care to see that the driver in charge is an experienced, reasonably safe and sober person.

The court further said:

> When two or more persons voluntarily drive or ride an automobile upon a public highway at a dangerously high rate of speed merely for the purpose of enjoying the exhilarating and pleasurable sensations incident to the swirl and dash of rapid transit, they * * * assume the risks of danger attendant upon the sudden and violent movements of the car * * *.

In *Webber* v. *Billings,* 184 Mich. 119, 150 N. W. 332, 334, plaintiff, with five other young men, hired a seven-passenger automobile to go from Ishpeming to Marquette, in Michigan, and on their arrival at Marquette they all, including the driver, partook more or less of intoxicating liquor. Later the party was increased to twelve persons in the car, and during the use of the car it capsized and the plaintiff was injured, and recovered a judgment in the trial court for his injuries. From this judgment an appeal was taken on the ground, among others, that the plaintiff was guilty of negligence as a matter of law. The supreme court held that the question of plaintiff's contributory negligence had been fairly submitted to the jury and the issues thereunder found in favor of the plaintiff. The court said, however:

> "He seems to have imbibed intoxicating liquors with the others and to have undertaken the journey without protesting either as to the overcrowding of the car or as to the alleged excessive rate of speed at which it was driven. It is, of course,

> elementary that, when seeking to recover damages for injuries caused by the negligent act of another, the plaintiff must show himself free from negligence causing or contributing to his injury. If it can be said in the present instance that the plaintiff acquiesced or participated in the negligence of the driver, he should not be permitted to recover."

See also, *Jefson* (*Jepson*) v. *Crosstown St. Ry. Co.*, 72 Misc. 103, 107, 129 N. Y. Sup. 233, wherein it was held that where a person riding in an automobile which was being driven at a high rate of speed was injured when the automobile collided with an obstruction negligently left in the street, he was not entitled to recover. The court said:

> "The mere fact that the plaintiff rode in the automobile 1500 feet, from Delavan Street to Jefferson Street, in something like 20 seconds, without remonstrance or even a suggestion to the driver that he stop the car or slacken its speed, places on the plaintiff all the recklessness or contributory negligence needed to sustain a finding of the jury that he was in an unreasonable use of the highway; and his failure to attempt to restrain the driver from pursuing such a madcap pace would warrant the jury in finding complete acquiescence on his part in the driver's negligence and carelessness, and render him answerable therefor."

The courts have also held that where a passenger falls over an obstruction in the aisle of a car, which he might have seen and avoided by the exercise of ordinary care (*Abernathy* v. *Lusk*, Mo. App., 182 S. W. 1049), or fails to use due care when riding on a freight train (*Harris* v. *Hannibal etc., Co.*, 89 Mo. 233),

or on a crowded train (*Norvell* v. *Kanawha etc., Co.*, 67 W. Va. 467), his contributory negligence may be a defense.

The general rule as to the duty of a passenger to use due care for his own protection is thus stated in 10 C. J. 1096-1097:

> "A passenger must exercise ordinary care, and such care only, for his own safety, that is, such care as an ordinarily prudent man would exercise for his safety and security under the same circumstances; and it is a well established rule, that, although there has been negligence on the part of the carrier contributing to the injuries, if the passenger fails to exercise ordinary care, and his failure is proximately connected with his injuries, he is guilty of contributory negligence which will defeat a recovery."

There is no merit in plaintiff's contention that a passenger cannot be held guilty of negligence unless he actually knew of the danger, as distinguished from what should have been observed by a person of ordinary prudence, situated as he was. If it should have been apparent to a reasonably prudent person, having the knowledge which plaintiff had, that it was dangerous to operate the motor car at a high rate of speed, as submitted by the district court (193, 201, 205), then even if he had been a passenger, the jury would have been justified in finding him negligent if he encouraged or acquiesced in the operation of the car at such dangerous rate of speed.

> The law requires a person to make reasonable use of his faculties to observe and avoid danger, and conclusively presumes that he knows

what he would have known had he made ordinary use of his senses (*DeHoney* v. *Harding,* 300 Fed. 696, 699).

In *Union Traction Company* v. *Sullivan,* 38 Ind. App. 513, 76 N. E. 116, 119, with regard to a passenger, the court said:

> "* * * if appellee knowingly exposed himself to danger such as an ordinarily prudent person under the circumstances would not have done, and was thereby injured, or if by reasonable precaution he could have foreseen the danger and avoided the injury, he ought not to be allowed damages."

In *United R. & E. Co.* v. *Riley,* 109 Md. 327, 71 Atl. 970, 974, the court said, of a passenger:

> "He should not be required to predicate danger, unless there was something in the situation known to him, or which he could have known by the exercise of reasonable care, from which he was or ought to have been warned of his peril."

Furthermore, the plaintiff is in no position to make complaint on this point for the reason that he recognized and accepted the correctness of this rule in the trial of the case. In his exception to the charge of the court on the issue of contributory negligence plaintiff's counsel said:

> "The criticism and exception to that is that Ellzey must have either known that it was dangerous to run it at the rate of speed at which he was encouraging it to be run, or the danger must have been so open and apparent that a person of ordinary care, situated as he was, would have appreciated that it was dangerous to run it at a high rate of speed" (200).

This language was repeated by plaintiff in his formal exceptions to the charge to the jury (214).

For all the reasons stated it is submitted that the judgment of the circuit court of appeals should be reversed, and the judgment of the district court affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

KANSAS CITY SOUTHERN RAILWAY COMPANY

PETITIONER

—VS.—

R. E. ELLZEY

RESPONDENT

ANSWER TO PETITON FOR CERTIORARI

S. P. JONES,
Marshall, Texas
BARKSDALE, BULLOCK, WARREN,
CLARK & VAN HOOK,
Shreveport, Louisiana;
Attorneys for Respondent

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I

The plaintiff in error asks for the extraordinary writ of certiorari, on what it claims to be an erorr of procedure by the Circuit Court of Appeals, and which error, if any, does not appear in the opinion rendered by that court,—the petition should be denied.

II

There is no merit in the contention of the plaintiff in error that the United States Circuit Court of Appeals has, in this case, repudiated or ignored any substantial rule of procedure or settled doctrine of procedure, as will very fully appear from a casual examination of the record in the case.

Nothing in the opinion in this case remotely indicates that the Circuit Court of Appeals has upset precedents or ruled differently to the established usages of the Federal Appellate Courts. The fact that the petition for certiorari points out no error discoverable by reading the opinion of the Circuit Court of Appeals discloses that it is not necessary to grant the writ in order to secure uniformity of decisions; likewise, that no error of such gravity and importance has been committed as will justify the writ.

In Re: Woods, Petitioner, 143 U. S. 202.

This, the leading case, announces the doctrine in substance that this extraordinary writ will only be granted when questions of gravity and importance are involved. That case also calls attention to the fact that it has long been the purpose of Legislation to relieve the United States Supreme Court of the excessive burden of general litigation, and that only when questions of gravity and importance are involved or when it is deemed necessary to maintain uniformity of decisions, should the Supreme Court resort to the extraordinary remedy of granting a writ of certiorari.

The plaintiff in error, after presenting fifty pages of printed argument, concludes the same by citing the case of American Construction Co., vs. Jacksonville, Tampa & Key West Railway Co., 148 U. S. 372 and quoting therefrom, showing that the Supreme Court of the United States holds that this extraordinary remedy should be sparingly exercised—and only in cases of gravity and importance, or in order to secure uniformity of decisions.

It is confidently believed that an examination of the record will disclose that there is no merit in the contention that by a careful examination of the entire record, it will appear that the Circuit Court of Appeals has considered errors committed by the trial court which were not properly preserved by exception.

The respondent—plaintiff in the lower court—contended there and has contended since—that under the peculiar facts and circumstances of this case, that the Railroad Company was liable to him and that he was entitled to a peremptory charge to that effect. Certainly that he was entitled to try his own case on the theory that if he had been guilty of negligence, that the subsequent negligence of Merchant caused the injury, or at least, that it was a question of fact for the determination of the jury, and which fact, the trial court had withdrawn from the consideration of the jury. The plaintiff below—respondent here—contended in the trial court that the doctrine announced in Weishaar vs. Kimble S. S. Co., 128 Fed. 597, 63 C. C. A. 139, was appricable for it does not appear in this case that the man Merchant so much as made a milk and water protest against the fact running which he claims Ellzey had encouraged.

We seriously contend that there is no merit in the petition for certiorari, and that it should be in all things denied.

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